No. 4063

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

PAUL C. BATES,

Plaintiff in Error,

vs.

OREGON-AMERICAN LUMBER COMPANY,

Defendant in Error.

Reply Brief of Plaintiff in Error.

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Defendant in error has urged a number of reasons for affirmance of the judgment rendered in the trial court. Some of these reasons plaintiff in error does not believe are before the Court. The trial court directed a verdict in favor of the defendant in error, upon the sole ground of want authority of Mr. Early to hire the plaintiff in error, and plaintiff in error was under the impression that this would be the only point raised upon the appeal and this was the only point briefed by the plaintiff in error. Defendant in error did not file a cross appeal, and in order that plaintiff in error's contention may be before the Court, we respectfully submit the following statement and authorities in reply to the brief of defendant in error.

It is claimed that because the plaintiff in error's complaint does not allege that plaintiff had a broker's license it does not state a cause of action, but this, we take it, would be a matter of defense. It is alleged in the Answer as an affirmative defense and

there is no evidence in this case that plaintiff in error is without a license.

Opposing counsel, on page eleven of their brief, admit that this would not prevent the maintenance of such an action in the Federal Courts, but seek to avoid the force of this rule by invoking another rule to the effect that when the statute declares it unlawful and fixes the penalty for the doing of certain things, the contract to do such prohibited things is void, even though not so declared by the statute.

The Broker's Act was passed by the Legislature of the State of Oregon in 1919. The contract sued uopn in the complaint was entered into in 1917, two years prior to the enactment of the Broker's Act. The plaintiff in error had entered into a general contract of hiring, as a special agent, and for two years he had performed services under this contract of hiring. It certainly cannot be contended or argued that this Act could wipe out the plaintiff in error's right to recover for services performed prior to its enactment. The statute itself does not seek to effect any existing contracts, and this contract having been in existence at the time of the enactment of the statute and the parties having operated under it for a period of two years, it cannot be claimed that the act would be applicable under such a state of facts.

Furthermore, the evidence would have disclosed that the plaintiff in error is not in the real estate business, never has been in the real estate business and was not engaged in the real estate business at the time of his employment by the defendant in error.

Mr. Justice Wolverton, in passing on the demurrer to the complaint, which demurrer raised the question as to the sufficiency of the complaint, the opinion being found on Page 21 of the Transcript of Record, uses the following language:

> WOLVERTON, District Judge.—This is a demurrer to the amended complaint, predicated upon the assumption that plaintiff was a real estate broker at the dates set out therein, and was acting in that capacity while in the employ of defendant and doing the things for which he is seeking to recover compensation, and that he was not licensed as such.
>
> The plaintiff sets forth that defendant, during August, 1917, having purchased a large tract of timber-land, employed him to assist and aid in developing the property and the timber thereon, and in devising ways and means of securing the best possible returns, and agreed to pay him for his services and to reimburse him for expenses incurred in connection therewith. Some fifteen specifications of services rendered are alleged in the complaint, as to nearly all of which, if not all, reasonable compensation is demanded.
>
> Section 808, Sub. 8, Lord's Oregon Laws, being a clause of the statute of frauds, was amended in 1917 (Sess. Laws 1917, p. 786), providing the manner of note or memorandum that shall be sufficient where an agent or broker is employed to sell or purchase real estate for another. In 1919 (Sess. Laws 1919, p. 238), an act was passed defining a real estate broker, and licensing (25) him to transact business as

such. This act was superseded by act of the Legislative Assembly in 1921, Sess. Laws. 1921, p. 438.

It will be seen from this series of acts that, while the style of agreement required on the part of real estate brokers was defined by law prior to the time plaintiff alleges he entered into the agreement of employment set forth in the complaint, namely, August, 1917, the acts requiring such persons to be licensed were adopted two and four years subsequent thereto. However, plaintiff was bound, if a real estate broker, to the observance of the statute of frauds as a prerequisite to maintaining his action. Whether the later acts are retroactive in their operation need not be discussed, in view of the conclusion I have reached touching the purpose and effect of the complaint.

Was the plaintiff a real estate broker, in view of the allegations of his complaint?

A review of the allegations of employment and specifications of services performed renders it obvious that plaintiff was not employed to sell or purchase specific tracts of realty designated by the defendant, with fixed commissions or compensations, but to collaborate with defendant in managing its property and assisting in disposing of or purchasing certain holdings. Plaintiff had no authority to buy or sell, except as his employer might direct and approve, and was always subject to his employer's directions in whatever he did in relation to the management, purchase or disposition of any real property in which it might be, or desired to be, concerned. In other words, plaintiff's employment

was that of an agent, subject to specific instructions and directions, and his services were rendered in pursuance thereof. He cannot, therefore, be classed as a real estate broker, within the purview of the acts of the Legislative Assembly above noted. Nor does agreement for his general employment fall within the restrictions of the statute of frauds. Sherman v. Clear View Orchard Co., 74 Ore. 240; Western Lumber Co. v. Willis, 160 Fed. 27; Springstein v. Lewis, 259 Fed. 518.

Demurrer overruled."

The opinion of Justice Wolverton sets forth the theory of plaintiff's complaint. The plaintiff in error was not employed as a real estate broker, but he was employed as any other employee would be employed. His time was always at the beck and call of defendant in error and he worked for a period of three and a half years in assisting and collaborating with the defendant in error in handling, managing and eventually disposing of its property. Defendant in error admits in the brief, page 12, that plaintiff in error could recover, so far as the question of real estate broker is concerned, for services performed before the passage of the act of 1919, but again seek to avoid the force of this rule by claiming that since plaintiff in error has treated the contract as an entire contract he cannot recover for any of his services.

Section 8313 of Oregon Laws provides: "Nothing contained in this act shall be construed as prohibiting or regulating detached transactions for the purchase, sale or rent of real

> estate by persons not engaged in the real estate business as a principal or partial vocation."

The evidence would have disclosed and defendant in error could not have established that the plaintiff in error was ever engaged in the real estate business prior to the transaction in question. This was simply an isolated detached transaction, and plaintiff was not hired as a real estate broker, but was hired, as Mr. Justice Wolverton says, to collaborate with the defendant in error and under special powers and authority.

9 Corpus Juris, page 510, defines a real estate broker as—

> "a person who is, generally speaking, engaged in the business of procuring purchases or sales of lands for third persons on a commission contingent on success."

Again, 9 Corpus Juris, page 559, provides that—

> "A statute precludes a broker from recovering commission unless his authority is in writing is in derogation of the common law and must be strictly construed; and hence such a statute will not apply to cases which are not strictly within its terms."

Again, this same authority, 9 Corpus Juris, page 565, in speaking of the business of a broker as affected by a license and after stating when a license is necessary, states the following rule:

> "This rule does not apply to one who is not a regular broker but acts only in an isolated case."

And again this same authority, 9 Corpus Juris, page 513, uses the following pertinent language:

> "One who, while engaged in other business, makes a single or occasional sale or other transaction for another under a special contract is not a broker and is not required to take out a license as such."

A case very much in point decided by the Supreme Court of the State of Oregon is that of Sherman vs. Clear View Orchard Company, 74 Ore. 240, in which the doctrine is laid down quoting from the syllabus:

> "A contract by an orchard company employing plaintiff to act as sales manager, organize a selling deartment, select suitable agents, and manage the company's selling force for a commission of 5 per cent on sales made by such agent or by himself was not a contract for the employment of an agent to sell real estate, and was therefore not invalid because not in writing, under Subdivision 8, Section 808 L. O. L., providing that an oral agreement, authorizing or employing an agent or broker to sell real property on commission, shall be void."

It appeals to us that this case meets every contention raised by defendant and places the plaintiff beyond the pale of the Broker's License Act of this State.

In the case of Western Lumber Company vs. Willis, 160 Federal, page 27, the 9th Circuit had under consideration a state of facts as follows:

The plaintiff was hired to point out certain timber lands for defendant, which lands were subject to reservation script. This timber land was to be pointed out to a timber inspector of the defendant

company. For such services plaintiff was to be paid one dollar per thousand feet for every thousand feet of timber or land so pointed, less the cost of purchasing the script necessary to select, locate and acquire such lands. The plaintiff performed these services and brought an action to recover, and the defense was raised that this constituted a broker's contract. But the Circuit Court of Appeals, speaking through Justice Morrow, held that the plaintiff was not employed as an agent or broker and that this was not a broker's contract.

Again in the case of Springstein vs. Lewis, 259 Federal, page 518-521, Judge Gilbert had under consideration a case where a man in Alaska had made a sale of real estate, and it was contended in defense that he did not have a real estate broker's license. The plaintiff was a merchant and the Court enunciated the following rules:

> "We find no merit in the contention that the plaintiff is not entitled to recover a commission for the reason that he had no license as a broker under section 2569, Compiled Laws of Alaska. The plaintiff was not engaged in the business of a broker. He was a merchant, and there is no evidence that he ever attempted to make a sale of real estate other than that which is here involved.
>
> In 9 C. J. 513, it is said:
>
> "One who, while engaged in other business, makes a single or occasional sale, or other transaction for another, under a special contract, is not a broker, and is not required to take out a

license as such." Smith v. Sharpe, 162 Ala. 433, 50 South. 381, 136 Am. St. Rep. 52; O'Neill v. Sinclair, 153 Ill. 525, 39 N. E. 124; Pope v. Beals, 108 Mass. 561; Woods v. Heron, 229 Pa. 625, 78 Atl. 1128; Johnson v. Williams, 8 Ind. App. 677, 36 N. E. 167.

It will be noticed that Judge Gilbert states there was no evidence that the plaintiff had ever attempted to make a sale of real estate other than that which was involved. This may be said of the plaintiff, Mr. Bates. The complaint does not show that he ever made a real estate sale or transaction prior to entering into this contract with the defendant.

The criterion, as we take it, is—What was Mr. Bates' business at the time he entered into this contract with the defendant? Was his business at that time that of a real estate broker or was his business something else? The statute says that a real estate broker is one whose business is—etc. In the absence of any statement in the Amended Complaint that Mr. Bates was engaged in the real estate business prior to the making of this contract, how can it be contended that Mr. Bates was a real estate broker? In the absence of any statement in the Amended Complaint that Mr. Bates was a real estate broker this court cannot assume that such was his business, and the fact is that he was never engaged in the real estate business prior to this particular transaction, if this could be considered real estate business.

In the case of Meyer vs. Wiest, 250 Pennsylvania State, 576, the Supreme Court of Pennsylvania

had under consideration a like state of facts and used the following language:

> "Neither this act nor prior legislation prohibits a person whose business or occupation is not that of a broker from receiving compensation for services rendered in single transactions of buying or selling real estate, or other property, for another."

And again in the case of Pierson vs. Donham, 104 N. E., 606, the Appellate Court of Indiana had under consideration a contract wherein the plaintiff was hired and employed to find, locate and obtain an option for the purchase of certain lands in the city of Terre Haute. The Court uses the following language:

> "The complaint is in one paragraph, and in substance states that in 1909 defendant employed plaintiff to find, locate and obtain an option of purchase of certain land in the city of Terre Haute, to be used as a lumber yard; that he accepted the employment and performed said services; that the price of the real estate was $13,500; that defendant approved the arrangements and contracts made by plaintiff in his behalf in pursuance of said employment and approved the price agreed upon for the property; that his services were reasonably worth 5 per cent. of the amount of the purchase price of said property, and the same is due and unpaid. Prayer for the judgment against defendant for $675.00.
>
> Appellants contend that the complaint is bad because it does not show that the contract for the real estate was in writing, and cites section 7463, Burn's Statutes 1908, in support of the

contention. It is also claimed that the complaint attempts to plead a special contract and fails to aver any definite arrangements to pay anything for the alleged services; that there can be no recovery on the quantum meruit, because it is an attempt to plead a special contract.

The complaint alleges in substance an employment to render certain services, and charges that the services were rendered by the plaintiff and sanctioned and approved by the defendant. The complaint is good as a common count, on the quantum meruit, for the services erendered in pursuance of the employment."

In the case of Chadwick vs. Collins, 26 Pa. St. Rep. 138, the court used the following language:

"From the bill of exceptions we learn that the suit was brought to recover a sum of money which the defendant had agreed to pay to the plaintiff for obtaining a purchaser for certain real estate of the defendant in the city and county of Philadelphia. The allegation is, that the plaintiff was not a licensed real estate broker, and that therefore he could not recover for services rendered in selling real estate * * *

"In making the use or exercise of the business of occupation of real estate brokers in Philadelphia and Pittsburgh a source of revenue to the Comonwealth, the legislature did not intend to prevent a person whose business or occupation was not that of a real estate broker from receiving compensation for services rendered in buying or selling real estate belonging to another.

"Any person may lawfully employ one who is not a real estate broker to buy or sell real

estate, and where such employment takes place, and labor is done under the employment, it must be paid for; at all events, the law will not lend its aid to the employer to defraud the employee out of his just reward."

In the case of Johnson v. Williams, 36 N.E. 167, an Indiana case, the court used the following language:

"The contention of counsel for appellant is that the appellee was not entitled to recover because he was not acting as a broker, contrary to sections 2090, 5269, 5274, Rev. St. 1881. We think it unnecessary to pursue and determine all the questions so ably presented by counsel for appellant, for the reason that counsel's reasoning is predicated upon a state of facts contrary to what is shown by the record in this case. In determining the correctness of the conclusions of law drawn by the court, we can look simply to the facts found by the court, within the issues. Had the court found as a fact that the appellee was acting as a broker in making the sale of bank stock for appellant, we would probably be called upon to put a construction upon the sections of the statute supra. However, the court found as a fact that the appellee 'was not engaged in a regular business of stock and exchange broker.' Whether or not he was so engaged is a question of fact to be determined from the evidence, and the appellant does not question the correctness of the facts found. The court having found that he was not acting as a broker, the conclusions were right. The court did not err in its conclusions of law. Judgment affirmed."

Again, in the case of Merced County v Helm et al, 36 Pac. 399-400, a California case, the court uses the following language:

> "The county of Merced passed an ordinance fixing the rate of county license taxes upon certain occupations within the county, and providing for the collection of the same by suit, in case the persons liable to pay the tax should engage in any business subject thereto, without having first procurd a license therefor."
>
> * * *
>
> "The distinction between a single act and the business in which the act is done is very marked, and is well recognized in adjudged cases. Weil v. State, 52 Ala. 19; Merrit v. State, 19 Tex. App. 435; Williams v. State, 26 Tex. App. 131, 9 S. W. 357; Jensen v. State, 60 Wis. 577, 19 N. W. 374. A single act does not constitute a busines; and when a sale is but an incident in, or the final act of, another business, it cannot be said to be the business which is carried on and transacted."

In the case of Clark v. Freeport Mining Company, 52 Pa. Superior Ct. 1-5, the court used the following language:

> "We do not find in the testimony such evidence as would have authorized the court to hold that the plaintiff was a broker in the transaction of which this action arises, and that he could not recover on the contract because he had not paid a license as broker. Occasional transactions by an attorney on behalf of a client in the investment of money are incidental to his principal business, and are not regarded as con-

stituting him a broker under the Act of May 7, 1907, Ph. 175. It does not appear that he held himself out as one engaged in a brokerage busines or that the negotiations of loans constituted his business. At any rate the question was one for the jury and not for the court."

In the case of Bollin v. State, 192 S. W. 196, an Arkansas case, the court used the following language:

"It is also insisted that the court erred in excluding proof that Blocker has no license as a broker to deal in real estate in the city of Ft. smith. In the first, place, Blocker was not a real estate broker. He was engaged in other business, and this was a single transaction by him. Moreover, the provision of the ordinance referred to did not provide that contracts made by real estate brokers without a license should be void."

In the case of Black v. Snook, 53 Atlantic Rep. 648, a Pennsylvania case, the court uses the following language:

"A person who sells real estate for another under a special contract, without holding himself out to be a real estate broker, may recover, though he had not complied with the act requiring real estate brokers to take out a license."

In the case of O'Neill v. Sinclair, 124 N. W. 124, the Illinois Supreme Court uses the following language:

"One who, while engaged in other business, negotiates a sale of land for another, is entitled to compensation, even though he has no license, and though there is in the city where the trans-

action occurred an ordinance declaring it unlawful to exercise within the city the business of real estate broker without a license therefor; since effecting a single sale does not constitute the exercise of the business of real estate brokerage."

In the case of Smith v. Sharp, 50 South, 382-384, the Alabama Supreme Court uses the following language:

"This action was brought by the appellant against the appellee to recover $1000 claimed to be due to the plaintiff as a broker for services rendered in and about a sale of certain property which belonged to the defendants. The defendants interposed a plea of the general issue, and also a special plea, to the effect that plaintiff had not taken out a license as a real estate broker."

* * *

"The fact that Smith had not taken out license as a broker did not invalidate his contract. Sunflower Lumber Co. v. Turner Supply Co. (Ala.), 48 South, 510. The evidence showed, at any rate, that he was not engaged in that business."

Again, in the case of Ord v. Baizley, 62 Pa. Superior, 395, the Pennsylvania court uses the following language:

As held in Chadwick v. Collins, 26 Pa. 138, practically there is no difficulty in ascertaining who are engaged in the business or occupation of brokers—it is those who hold themselves out to the public as such, generally having offices or places of business, the character of which is

indicated by clear and unmistakable evidence. Gedinsky v. Strouse, 6 Pa. Sup. St. 587; Raeder v. Butler, 19 Pa. Supt. Ct. 604. The sale in this instance was an isolated and personal negotiation."

The foregoing authorities conclusively show that assuming that the cause of action involved a real estate transaction, no broker's license was required by reason of Chapter 15 Oregon Laws, relating to the regulations of the business of real estate brokers, but plaintiff most emphatically insists that his cause of action is not one involving real property. Plaintiff's cause of action had its inception in the agreement set out in paragraph IV of plaintiff's amended complaint. This was a special contract of hiring to perform numerous things to be at the beck and call of the defendant to perform any service that might be required of him. The matters thereafter set out simply show what was done pursuant to this special contract of hiring and these specifications are not plaintiff's causes of action, and as a matter of fact could have been eliminated from the complaint in the absence of a motion on defendant's part to make our complaint more definite and certain. It must be borne in mind that this is not an agreement upon the merits of this case, but an objection to the complaint, and unless the complaint in its entirety fails to state a cause of action or eliminates a necessary allegation in order to enable plaintiff to recover, the complaint should be sustained. As said in Jackson v. Stearnes, 48 Oregon, 25-28, point 3:

"The demurer interposed in the case at bar was general, and if any part of the complaint herein states facts entitling the plaintiff to equitable relief, the challenge submitted to his primary pleading for insufficiency should have been overruled. * * * Bliss, Code Pl. (3d Ed.) 8417; 6 Ency. P. and Pr. 346; Wagg v. Scott, 29 Ore. 386 (45 Pac. 774)."

Defendant's counsel at some length argue many different propositions of law which under our version are not within the scope of this appeal.

For ought that appears upon the face of this complaint the entire transaction set out in plaintiff's complaint had been fully completed before the passage of the real estate broker's statute.

To recapitulate our position we have this to say: First, plaintiff's cause of action is based upon a special contract of hiring. Second, assuming which we most positively deny, that this was a real estate transaction, the complaint does not show that the cause of action herein relied upon was other than an isolated or occasional transaction, and therefore, under the authorities heretofore cited was not within the purview of Chapter 15, Oregon Laws. Third, our action does not proceed upon a real estate transaction and therefore the Statute of Frauds is in no wise involved in this case.

It is next urged by defendant in error that the statute of frauds is applicable to this case, but plaintiff's contract, as we have sought to show heretofore, was not an agreement for the employment of an agent or broker to sell real estate. Further-

more, plaintiff in error is not required to allege in his complaint that the contract was in writing or oral. There is nothing in the evidence to disclose that this contract was oral. As a matter of fact, if the question had been raised the plaintiff in error would have been able to produce abundant written evidence of his hiring, but as before stated and as set forth in the opinion by Justice Wolverton, this is not a contract coming within the purview of the statute of frauds.

Sherman v. Clear View Orchard Co., 74 Ore. 240.
Western Lumber Co. v. Willis, 160 Fed. 27.
Springstein v. Lewis, 259 Fed. 518.

Much is said in defendant in error's brief regarding *this unusual and extraordlinary contract;* but what is there unusual or extraordinary in this contract? The contract was not made for any definite period. It could be terminated any day by the officers of defendant in error. It could be terminated by plaintiff in error upon a moment's notice. It is not a contract for life or an obligation binding the defendant company for years to come. The plaintiff in error, as the complaint sets forth and the record discloses, labored the same as any other person would labor under like circumstances. The contract was a usual and common contract, taking into consideration the purposes for which this property was acquired. Charles T. Early testified that he was the general manager of the company. The evidence is conclusive that he reportd to the pres-

ident, David C. Eccles. The evidence also discloss that David C. Eccles knew of the employment of the plaintiff in error and knew that plaintiff in error was performing services for his company. The evidence discloses that the president and plaintiff in error at various times interviewed each other regarding the transactions set forth in the complaint, and the president accompanied the plaintiff in error on various trips while the plaintiff in error was in the performance of his duties.

It is said, page 64 of the brief of defendant in error:

> "An inspection of the Articles of Incorporation of this Compan shows that David C. Eccles was president and general manager and Charles T. Early was vice-president of this corporation at the time this contract was alleged to be entered into, to-wit, August, 1917."

So far as the plaintiff in error is concerned, it makes little difference whether Mr. Early or Mr. Eccles was the general manager. Both of these parties knew of this employment. Mr. Early says he made the contract with the plaintiff in error and reported to the president, who, it is claimed, was the general manager.

POINTS AND AUTHORITIES.

The plaintiff in error never having been engaged in the real estate business and there being no evidence in the record that he ever engaged in the real estate business, and this being a mere isolated transaction and his employment being that of a

special agent and not as a broker, the broker's act does no apply.

Sherman v. Clear View Orchard Co., 74 Ore. 240.
Western Lumber Co. v. Willis, 160 Fed. 27.
Springstein v. Lewis, 259 Fed. 518.
9 Corpus Juris, pages 513-559-565.
Meer v. Weist, 250 Pa. Ct. 576.
Pierson v. Donham, 104 N. E. (Ind.) 606.
Chadwick v. Collins, 26 Pa. St. 138.
Johnson v. Williams, 36 N. E. (Ind.) 167.
Merced County v. Helm, 36 Pac. (Calif.) 399-400.
Bollin v. State, 192 S. W. (Ark.) 196.
Black v. Snook, 53 Atl. (Pa. St.) 648.
O'Neill v. Sinclair, 124 N. W. (Ill.) 124.
Smith v. Sharp, 50 So. (Ala.) 382-384.

The reply alleges that the defendant in error took the fruits and benefits of plaintiff in error's work and that because of it having accepted his labor and service it had ratified the acts of Early and Eccles in hiring him. This ratification dates back to the original hiring and creates an estoppel, all of which was for the jury, it being a general rule of law that a ratification by a principal of the unauthorized acts of its officer relates back to the original transaction and establishes the agency.

Emmett vs. Astoria Marine Iron Works, 97 Ore., 632; s. c. 192 Pac. 1113.

The contract set forth in the complaint was entered into in 1917. The broker's act did not become effective until 1919, two years afterward, and would not apply to a contract entered into previously.

Bonner's Law Dictionary, Vol. 3 (Rawle's Third Revision) page 2950.
White vs. United States, 1919 U. S. 545-551.
United States Fidelity So. vs. Struthers Wells Co. 209 U. S. 306-314.

A license to act as a broker is presumed and want of a license is a matter of defense.

Shepler vs. Scott, 85 Pa. St. 329-331.
Sprague vs. Reilly, 34 Pa. Superior Ct. 332-334.
Munson vs. Fenno., 87 Ill. App. 655-657.

The statute of frauds has no application to this case, because this is not a real estate transaction, but constitutes a general hiring of the plaintiff in error.

Sherman vs. Clear View Orchard Co. 74 Ore. 240.
Western Lumber Co. vs. Willis, 160 Fed. 27.
Springstein vs. Lewis, 259 Fed. 518.

In the brief of defendant in error something is said of a conspiracy entered into by and between the plaintiff in error and Charles T. Early to defraud this defendant in error Company. It is even insinuated that plaintiff in error and Mr. Early were in collusion.

The fact is that the defendant Company has never paid to the plaintiff in error one cent for his services which he has rendered. When the property was originally purchased, Mr. Bates, after a consultation with the president of the Company, David C. Eccles, and Mr. Early, did give to Mr. Early a gratuity. This was Mr. Bates' money and he could do with it as he pleased. The money was only taken

by Mr. Early after the president advised him to receive same. And this money so paid to Mr. Early was not the money of defendant in error. It is in evidence that a portion of this property was sold to the Inman-Poulsen Lumber Company, for the sum of about a million dollars. This sale was made, as the evidence discloses, through the efforts of Mr. Bates—was ratified and consummated by the board of directors of the defendant in error Company, and Mr. Bates for his services was paid a certain sum by the Inman-Poulsen Lumber Company, of which Company Mr. Poulsen is the president and is the father-in-law of Mr. Bates. The evidence would have disclosed that this Inman-Poulsen transaction was authorized and consummated by the defendant in error Company, and Mr. Bates' services, instead of being paid for by the defendant in error Company, were paid for by the father-in-law of Mr. Bates, and out of this money which belonged to Mr. Bates a portion was given to Mr. Early.

The evidence also shows that a binding contract had been entered into with the Kerry Lumber Company for $3.15 per thousand, but this contract was not consummated by the defendant in error Company, and finally the property was sold to the Central Coal & Coke Company, with the exception of twenty per cent., for a total value of seven million dollars. Thus, we have here a company paying three million six hundred fifty thousand dollars for property which they held for a period of a little over three years and sold for eight million dollars and

still retain twenty per cent. of the property; and defendant in error makes the bold allegation that a conspiracy was entered into between Mr. Early, who had been in the employ of this Company for over thirty years and had more to do with making this company and its prosperity than any other officer of the Company, whose acts, as he says, had never been questioned during the years of his employment, and whose services were highly and favorably commended by the board of directors of the Oregon Lumber Company at the time of his resignation, and Mr. Bates to defraud defendant in error.

It is said in the brief of the defendant in error that there is a distinction between the Oregon Lumber Company and the Oregon-American Lumber Company, but the record shows that the stockholders were identical; that the officers of the two companies were the same, and this property was originally purchased with the intention of having it conveyed to the Oregon Lumber Company, but instead this new company was formed for the purpose of development.

We respectfully submit that after the performance of the services by plaintiff in error and after this defendant in error has taken the fruits and benefits of his labors, defendant in error ought not now to be permitted to say that the original hiring of the plaintiff in error was beyond the scope of Mr. Early's or Mr. Eccle's authority.

As stated in defendant in error's brief, the property of the defendant in error was all in the State

of Oregon. Mr. Early was the only officer and agent of that company in this State and he handled its property, looked after its assets, and who would not be justified in assuming that he had authority to make contracts of hiring such as plaintiff in error claims in this case.

We respectfully submit that these questions should have been submitted to the jury.

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Attorneys for Plaintiff in Error